Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

ALBERTA DESHAY, *et al.*,

Petitioners,

v.

BASTROP INDEPENDENT SCHOOL DISTRICT, *et al.*,

Respondents

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Fifth Circuit

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Petition For Writ of Certiorari

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QUESTIONS PRESENTED

I. Whether a severely handicapped child, who is unable to care for or protect himself, "voluntarily" enrolled in a federally funded secondary school program, has fewer constitutional rights than a person confined in a prison or a mentally retarded person confined in a state school or hospital.

> This question asks the Court to give meaning to the "shock the conscience" standard" for substantive due process claims set forth in *Collins v. City of Harker Heights*, Tex., 503 U.S. 115, 112 S.Ct. 1061 (1992).

II. Whether a severely handicapped child, if he has rights comparable to a person confined in a prison or a mentally retarded person confined in a state school or hospital, including the right to bodily integrity, who is severely injured at a federally funded secondary school, and the acts leading to those injuries are in violation of the child's constitutional rights, should those acts be measured on the "totality of the circumstances", including acts before and after the child's initial injuries.

> There is a difference in the Circuits as to the application of post-incident events to determine policy or custom. The Fifth Circuit under *Grandstaff v. City of Borger,* 767 F.2d 161 (5th Cir. 1985), *cert denied*, 480 U.S. 916 (1987), and as demonstrated in this case, is limiting such application to outrageous police conduct involving the wanton use of guns on hapless citizens who are killed, and will not be applied to life threatening injuries by governmental agents to helpless citizens who are in the custody of governmental agencies such as BISD. The First Circuit, on the other hand, has cited the *Grandstaff* decision in *Roma Construction Co. v. Arusso,* 96 F.3d 566, paragraph 59, (1st Cir. 1996) in support of the proposition that in a municipal setting "a fact finder could conclude that extortion of outsiders, businessmen, or developers, if proven, was 'the way things are done and have been done' in the Town." Such analysis is applicable to all the § 1983 related issues regarding Appellants' case, and if applied to the totality of the

circumstances, the Supreme Court should reverse the decisions of the Courts below.

PARTIES

The parties in the Court of Appeals, whose judgment Petitioner's seek to have reviewed, include Petitioners, Alberta DeShay, Individually and as next friend for her son, Kevin O. DeShay, Henry DeShay, individually and as next friend for his son Kevin O. DeShay, as well as Respondents, Bastrop Independent School District Bastrop Special Education Cooperative; Paul H. Fleming; Verla Long; Margaret Ryan; Unknown Employees of Bastrop Independent School District and Bastrop Special Education Cooperative, in their official capacities.

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OPINIONS BELOW

The opinions of the Fifth Circuit Court of Appeals were not published and are reprinted as Appendix B-1 and C-1 to this Petition. The Opinion of the District Court for the Western District of Texas was not published and is reprinted as Appendix A-1.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on April 16, 1999. A timely Petition for Rehearing and Rehearing *en banc* was denied on May 17, 1999, and this Petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42 of the United States Code, § 1983 (1988) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. 1997), provides:

> .....for equal educational opportunities for handicapped persons.

Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (1990 & Supp. 1996), provides:

> .....establishes a federal right for parents and/or their child to a hearing to challenge the content of student records in order to ensure that the records

> are not inaccurate, misleading, or otherwise in violation of the privacy, or other rights of the student.

Fourteenth Amendment of the Constitution of the United States, provides that:

> ....nor shall any State deprive any person of life, liberty, or property without due process of law;....

Fifth Amendment of the Constitution of the United States, provides that:

> No person shall be ..... deprived of life, liberty, or property, without due process of law;...

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

On the morning of September 15, 1993, Kevin DeShay, a severely handicapped special education student and then 15 years old, had both his legs broken while under the custodial care of the Bastrop Independent School District, Bastrop, Texas. Personnel associated with The School District and the Special Education Cooperative thereafter entered into a conspiracy to hide the fact that Kevin was even injured while under the Defendants' custodial care.

Plaintiffs-Appellants, hereinafter "the DeShays," filed their complaint on August 23, 1995, alleging causes of action arising under 42 U.S.C. § 1983. Defendants/appellees, Bastrop Independent School District ("BISD"), Bastrop Special Education Cooperative (BSEC), Paul H. Fleming, Verla Long, Margaret Ryan, Helen Smith, and Unknown Employees of BISD and BSEC in their

individual and official capacities, hereinafter referred to collectively as "BISD," filed their Motion to Dismiss on September 9, 1995. On October 6, 1995, the case was referred to U.S. Magistrate Judge Alan D. Albright. The DeShays filed an Amended Complaint on July 10, 1996 adding causes of action arising from § 504 of the Rehabilitation Act of 1973, and the Family Educational Rights and Privacy Act of 1974.

On November 8, 1996, the District Court granted BISD's Motion to Dismiss the DeShays' § 1983 claims against the individual defendants in their individual capacities. The DeShays subsequently filed their Third Amended Complaint on August 1, 1997. The Amended Complaint added a cause of action arising under the Texas Open Meetings Act and dropped teacher Helen Smith from the lawsuit entirely.

BISD filed their Motion for Summary Judgment on October 2, 1997. The DeShays filed their Response on November 10, 1997. BISD filed a Reply on December 9, 1997. The District Court heard oral argument from all parties on December 11, 1997. The DeShays filed a Supplement on December 31, 1997.

On January 7, 1998, the Honorable Alan Albright filed his Judgment and Order granting summary judgment as to all of the DeShays' claims. The DeShays filed their Motion for Relief from Judgment on January 22, 1998. The Order denying the DeShays' Motion for Relief from Judgment was issued on March 16, 1998. Subsequently, the DeShays filed a Notice of Appeal on April 8, 1998.

The DeShays have provided sufficient summary judgment

evidence as to each of the violations alleged in their Third Amended Complaint. Therefore, the District Court erred in granting summary judgment to BISD as to all of the DeShays' claims, and the Fifth Circuit erred in sustaining that decision in an unpublished opinion on April 17, 1999, overruling the petition for rehearing on May 17, 1999,

B. STATEMENT OF FACTS

On the morning of September 15, 1993, Kevin DeShay, who is totally unable to care for or defend himself, and who has the functional capacity of an infant, had both his legs broken while under the custodial care of the Bastrop Independent School District, Bastrop, Texas. Kevin was delivered to his special education classroom at BISD by his father that morning and the boy appeared to be in no distress whatsoever at that time.

Later that morning, Kevin's teacher, Helen Smith, attempted to clear Kevin's congestion by rolling him on a therapy ball. She placed Kevin, chest first, on the large, three foot-plus rubber therapy ball with the assistance of a teacher's assistant, and began rolling Kevin on the therapy ball by herself. Almost immediately thereafter, Ms. Smith noticed that Kevin was experiencing pain in his legs and hips. Ms. Smith summoned the school nurse, Margaret Ryan, to examine Kevin. Nurse Ryan conducted a brief "examination" of Kevin. Despite Kevin's obvious discomfort, nurse Ryan conducted no further tests or examinations, although she did go to see him later that afternoon. School officials did not summon emergency care, though nurse Ryan

admitted that such care would have been summoned had Kevin been able to communicate the extent of his injuries to the staff. Kevin remained in his bed for the next several hours, receiving no further treatment. At approximately 3:45 p.m., Kevin's brother, Perry, arrived at the school to take Kevin home. He was advised only that Kevin was in discomfort and should be taken to a doctor. Later that day Kevin's parents took Kevin to the emergency room, where a doctor determined that both of Kevin's legs had potentially life threatening compound fractures. These injuries required emergency surgery.

Thereafter, the Defendants below entered into a conspiracy to hide the fact that Kevin DeShay was even injured at BISD. If the Defendants are allowed to prevail, they can claim that they still never had any notice of the constitutional failings of their special education program. As the last act of BISD, the Board gave complete approval to all the acts of school personnel concerning Kevin DeShay, including the acts of the Superintendent, who had complete discretion as to the information that he provided the Board.

Kevin DeShay, as a result of a childhood accident, is almost completely helpless, and his condition makes it impossible for him to speak. He is completely wheelchair dependant and has little or no voluntary control over his bodily functions. He has also been diagnosed with severe osteoporosis. Kevin was admitted to BISD's special education program at the age of six.

The primary issue of this appeal is whether BISD had a "custom" or "policy" which resulted in injury to Kevin DeShay.

While BISD does not have an official policy mandating that BISD officials harm special education students like Kevin DeShay, BISD has a custom which achieved that very result. The DeShays have provided evidence which demonstrates that BISD has a custom of ignoring official policy, thereby creating an environment in which special education children are at risk of receiving grossly inadequate care.

This custom of disregard for official policy is shown by evidence that supports each of the claims alleged by the DeShays. The DeShays have provided sufficient summary judgment evidence to show that BISD's custom of ignoring official policy violated Kevin DeShay's rights under 42 U.S.C. § 1983. Such a violation is supported under several theories of § 1983 liability, including acts by individual policymakers. Furthermore, this custom of indifference to official policy resulted in Kevin DeShay being treated differently solely because of his handicap, a violation of § 504 of the Rehabilitation Act of 1973. The DeShays have also provided sufficient summary judgment evidence to support the § 504 claim.

By ignoring the legal requirement that the DeShays be presented with all records concerning BISD's investigation of Kevin's injuries, BISD officials prevented the family from ensuring the accuracy of Kevin's records in violation of FERPA. In addition, BISD's custom of ignoring legally mandated policy resulted in a violation of the Texas Open Meetings Act. Rather than holding the "hearing" on the DeShays' complaint in open session, as the nature of the complaint would warrant, the BISD School Board decided to hold the hearing in closed session.

Furthermore, the District Court erred in denying several pretrial motions. Due to the critical nature of teacher Helen Smith's testimony, and the importance of determining the extent of her mental disabilities, the District Court abused its discretion by declining to order an independent medical exam of Helen Smith. The District Court also erred in declining to grant the DeShays' access to the certified agendas of closed session meetings concerning special education students held by BISD. The content of the agendas is particularly relevant to the issue of the credibility of BISD officials. Finally, the District Court erred in dismissing the DeShays' claims against individual defendants-appellees Margaret Ryan and Verla Long in their individual capacities. Even if no special relationship analysis is implicated by the facts of this case, the conduct of these individuals is the type of reckless conduct which will defeat qualified immunity.

REASONS FOR GRANTING THE WRIT

I. Whether a severely handicapped child, who is unable to care for or protect himself, "voluntarily" enrolled in a federally funded secondary school program, has fewer constitutional rights than a person confined in a prison or a mentally retarded person confined in a state school or hospital.

This question asks the Court to give meaning to the "shock the conscience" standard" for substantive due process claims set forth in *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 112 S.Ct. 1061 (1992).

In *Youngberg v. Romeo*, 457 U.S. 307 (1982), the Supreme Court held that "If it is cruel and unusual punishment to hold

convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed – who may not be punished at all – in unsafe conditions." Here we have a child who is at a similar functional level as the *Youngberg* plaintiff, but who, according to the decisions below, has no rights that have been violated. An expert for Plaintiff in the District Court below has provided sworn testimony that School District personnel lacked appropriate training in dealing with a student like Kevin DeShay, such lack of training resulting in, or exacerbating the injuries that Kevin DeShay suffered. If Kevin DeShay had been involuntary committed in a state school or hospital, such fact alone would have sufficed to allow Plaintiff to surmount summary judgment.

The Court "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this still unchartered area are scarce and open-ended." *Collins v. City of Harker Heights, Texas,* 503 U.S. 115, 112 S.Ct. 1061, 1068 (1992). In *Daniels v. Williams*, 474 U.S. 327 (1986), the Court began to define those guideposts by making clear that the Due Process Clause is not implicated by negligent conduct. The Court reserved the question of whether something less than intentional conduct, such as recklessness or gross negligence, is enough to trigger the protections of due process. *Id.* At 334 n. 3. In *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), the Court provided another guidepost by making clear that the Due Process Clause imposed no affirmative duty in a non-custodial setting. The Court then indicated in dicta, however, that the state may have some

responsibility where it plays a role in the creation of a dangerous situation or renders an individual more vulnerable to harm. *Id.* At 201.

In 1992, this Court rejected the notion that deliberate indifference to safety, standing alone, was sufficient to establish a substantive due process violation in a non-custodial setting. In *Collins v. City of Harker Heights, Texas,* 112 S.Ct. at 1061, a case involving allegations that the city's deliberate indifference to the safety of its sewer workers caused the death of one of its employees, the Court stated that only state action which "can properly be characterized as arbitrary or conscience shocking in the constitutional sense" rises to the level of a substantive due process violation. *Id.* At 1070. The *Collins* decision did not elaborate on the content of the "shock the conscience" standard except to note that Collins' claim was "analogous to a fairly typical state law tort claim," which the Court had previously held were not constitutional violations. *Collins*, 112 S.Ct. at 1070.

In the wake of *Collins* lower federal and state courts have struggled to give meaning to the "shock the conscience" standard. A reading of such cases continues to note the lack of direction that lower courts have in making a determination of acts that shock the conscience test, except to find that, generally speaking, it does not exist. A review of such cases does not show a similar fact pattern as with Kevin DeShay where a completely dependent child is severely injured due to lack of training, and that failure is hidden from the public through official policy and fraud. See *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993); *Fagan v. City of*

Vineland, 22 F.3d 1296 (3d Cir. 1994); *L.W. v. Grubbs*, 994 F.2d 119 (9th Cir. 1992) [the court held that the § 1983 plaintiff had stated a claim by alleging that she was a registered nurse employed by the state of Oregon, that her supervisors had directed her to work alone with a known violent sex offender after leading her to believe that she would not be required to work under such conditions, and that she had been assaulted by the sex offender once she was alone with him]; *Leffall v. Dallas Independent School District*, 28 F.3d 521 (5th Cir. 1994); *Gregory v. City of Rogers*, 974 F.2d 1006 (8th Cir. 1992) (en banc); *Monahan v. Dorchester Counseling Center, Inc.*, 961 f.2d 987 (1st Cir. 1992); *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992); *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994); *Branch v. Turner*, 27 F.3d 1334 (8th Cir. 1994); *Mark v. Borough of Hatboro*, 51 F.3d 1137 (3d Cir. 1995); *Brown v. Nix*, 33 F.3d 951 (8th Cir. 1994); *Interport Pilots Agency, Inc. v. Sammis*, 14 F. 3d 133 (2nd Cir. 1994); *Giuffre v. Bissell*, 31 F.3d 1241 (3rd Cir. 1994); *Lowrance v. Achtyl*, 20 F.3d 529 (2nd Cir. 1994); *LRL Properties v. Portage Metro Housing Authority*, 55 F.3d 1097 (6th Cir. 1995); *Skinner v. City of Miami*, 62 F.3d 344 (1995); *Robertson v. Plano City of Texas*, 70 F.3d 21 (5th Cir. 1995); *L.W. v. Grubbs*, 92 F.3d 894 (9th Cir. 1996); and *Medeiros v. O'Connell*, 150 F.3d 164 (2d Cir. 1998).

Related to the "shock the conscience" concept is the "state created danger" theory. As noted by the Fifth Circuit in 1994, while there are still no state created danger theory cases in the Fifth Circuit, there are some from around the nation.

"We have found no cases in our circuit permitting § 1983

recovery for a substantive due process violation predicated on a state-created danger theory, and it could be argued that the passage from *DeShaney* quoted above was meant only to describe the kind of circumstances giving rise to a "special relationship" between state and individual; for purposes of this case, however, we may assume without deciding that our court would recognize the state-created danger theory. We first review the cases from other circuits relying on this theory. In *Wood v. Ostrander*, 879 F.2d 583, 590 (9th Cir.1989), *cert. denied*, 498 U.S. 938, 111 S. Ct. 341, 112 L. Ed. 2d 305 (1990), for instance, the court held that a § 1983 plaintiff could survive summary judgment when she had introduced evidence that a police officer had arrested the driver of a car and deserted the plaintiff, who was the passenger, in a high crime area in the middle of night, where she was later sexually assaulted. In *White v. Rochford*, 592 F.2d 381, 382-83 (7th Cir.1979), the court found that the § 1983 plaintiffs, who were small children, had stated a claim when they alleged that police officers had arrested their uncle and left them unattended in a car on the side of the freeway. In *L.W. v. Grubbs*, 974 F.2d 119, 121-22 (9th Cir.1992), cert. denied, U.S. , 113 S. Ct. 2442, 124 L. Ed. 2d 660 (1993), the court held that the § 1983 plaintiff had stated a claim by alleging that she was a registered nurse employed by the state of Oregon, that her supervisors had directed her to work alone with a known violent sex offender after leading her to believe that she would not be required to work under such conditions, and that she had been assaulted by the sex offender once she was alone with him. Other cases cited by *Leffall* are to similar effect. See, e.g., *Dwares v. City of New York*, 985 F.2d 94, 98-99 (2d Cir.1993) (holding that it would violate due process for police officers to conspire with "skinheads" and sanction violence by skinheads against persons demonstrating and burning American flags); *Nishiyama v. Dickson County, Tenn.*, 814 F.2d 277, 282-83 (6th Cir.1987) (en banc) (holding that a § 1983 complaint stated a claim by alleging that county officials allowed a convicted felon "trusty" to drive a patrol car and that the trusty had used the patrol car to direct a motorist to pull over to the

side of the road, where the trusty murdered her). We note that the First Circuit has refused to extend the state-created danger doctrine to a case in which the state provided a van to transport a mentally ill person and the person injured himself by jumping out of the van because he was insufficiently restrained. *Monahan v. Dorchester Counseling Ctr., Inc.*, 961 F.2d 987, 993 (1st Cir.1992) ('Although the Commonwealth [of Massachusetts] may have played some causal role in the harm, it did so only because Monahan voluntarily availed himself of a Commonwealth service.')."

Leffall at paragraph 55.

In the case of Kevin DeShay, although he voluntarily participated in the special education programs provided by BISD, he was essentially in their custodial care, unable to defend himself against inadequately trained personnel in a school district in which it was the policy, let alone custom, given the totality of the circumstances, to treat individuals like Kevin DeShay in a deliberately indifferent manner, and that custom became policy, including all the fraud that was associated with it, when the whole series of events was subsequently approved by the school board. Against this background, it is the law in the Fifth Circuit that Kevin DeShay has no remedy for the violation of his rights, including his right to bodily integrity.

II. Whether a severely handicapped child, if he has rights comparable to a person confined in a prison or a mentally retarded person confined in a state school or hospital, including the right to bodily integrity, who is severely injured at a federally funded secondary school, and the acts leading to those injuries are in

violation of the child's constitutional rights, should those acts be measured on the "totality of the circumstances", including acts before and after the child's initial injuries.

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It is Petitioners' contention that the Fifth Circuit failed to review the facts of this summary judgment case in the proper light, i.e. reading the facts and all reasonable factual inferences in the light most favorable to the nonmovant, in this case the DeShays. As with every aspect of the Fifth Circuit's decision, the totality of the circumstances were not considered. At best the Fifth Circuit analyzed the facts in such a narrow fashion that the issue of custom was impossible to reach.

The Fifth Circuit took this approach basically because of the limited application it decided to apply in regards to *Grandstaff v.*

City of Borger, 767 F.2d 161 (5th Cir. 1985), *cert denied*, 480 U.S. 916 (1987). See Panel decision at page 3-4. Evidently the *Grandstaff* decision is limited to severe police conduct involving the wanton use of guns on hapless citizens who are killed, and will not be applied to life threatening injuries by governmental agents to helpless citizens who are in the custody of governmental agencies such as BISD, and who have a constitutional right to their bodily integrity. *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443 (5th Cir. 1994), *cert denied*, U.S. , 115 S. Ct. 70, 130 L. Ed. 2d 25 (1994).

Many other circuits have also cited to *Grandstaff*, or subsequent acts constituting evidence of custom, to the situation concerning police conduct. See *Carter v. District of Columbia*, 795 F.2d 116, paragraph 38 (D. C. Cir. 1986); *Parker v. District of Columbia*, 850 F.2d 708, paragraph 106 [dissent] (D. C. Cir. 1988); *Hegarity v. Somerset County*, 53 F.3d 1367, paragraph 87 (1st Cir. 1995); *Tierney v. Davidson*, 133 F.3d 189, paragraph 73, footnote 7 [only referencing *Grandstaff* for the difference between a common law tort versus constitutional violation] (2d Cir. 1998): *Archie v. City of Racine*, 826 F.2d 480, paragraph 50 [facts of *Grandstaff* distinguished on the facts] (7th Cir. 1987); *Mettler v Whitledge*, 165 F.3d 1197, paragraph 49 [similar *Grandstaff* theory not supported by the facts] (8th Cir. 1999); *Henry v. County of Shasta*, 132 F.3d 512, 98 Cal. Daily Op. Serv. 1615, paragraph 46 ["we reiterate our rule that post-event evidence is not only admissible for purposes of proving the existence of a municipal defendant's policy or custom, but is highly probative with respect to that inquiry", referring to *Grandstaff* as "the leading case on the

use of post-event evidence in § 1983 municipal liability cases"] (9th Cir. 1997); *Larez v. City of Los Angeles*, 946 F.2d 630, 645, paragraph 95 (9th Cir. 1991); *Allen v. Muskogee*, 119 F.3d 837, paragraph 59 (10th Cir. 1997); *Bella v. Chamberlain*, 24 F3d 1251, paragraph 40 [facts of case do not rise to the *Grandstaff* criteria] (10th Cir. 1994); and *Cannon v. Taylor,* 782 F.2d 947, paragraph [not cited for post-incident events] (11th Cir. 1986). See also *Kibbe v. City of Springfield*, 777 F.2d 801, 807-08 (1st Cir. 1985), *cert. granted*, 475 U.S. 1064, 106 S. Ct. 1374, 89 L.Ed. 2d 600 (1986), *cert. dismissed*, 480 U.S. 257, 107 S. Ct. 1114 (1987).

The First Circuit has not construed *Grandstaff*, or similar facts, as narrowly as the Fifth Circuit, or applied it only to police situations, as does the Fifth Circuit. See *Roma Construction Co. v. Arusso*, 96 F.3d 566, paragraph 59, (1st Cir. 1996). In *Roma*, basically a RICO case against a municipality and its mayor, also had a § 1983 civil rights claim. The First Circuit noted, citing to both to *Grandstaff* and *Kibbe v. City of Springfield*, 777 F.2d 801, 806 (1st Cir. 1985), that:

> "While a showing that Arusso acted illegally in the exercise of his discretion as Mayor might not by itself give rise to municipal liability, we think that under these pleadings, the plaintiffs could indeed prove a set of facts from which a trier of fact could infer an unconstitutional policy or custom with respect to the Town's government. For example, a fact finder could conclude that extortion of outsiders, businessmen, or developers, if proven, was ***'the way things are done and have been done'*** in the Town." [Emphasis added]

BISD is the largest employer in the county in which it is located,

and the record has many instances in which that power is exercised, including school officials references to police investigations that never took place. The above analysis from *Roma* is applicable to all the § 1983 related issues regarding Appellants' case, and if applied to the totality of the circumstances, the Fifth Circuit should have reversed the decision of the Court below.

As Petitioners' attorney stated in the Petition for Rehearing and during oral arguments before the Fifth Circuit, there are three time periods that the § 1983 analysis should be applied. First, the time period leading up to the injury of Kevin DeShay where his legs were broken at the BISD facility. Second, the day of the life threatening injury in which BISD failed to provide meaningful medical care, leaving the child essentially without medical care and moaning in pain all day long. And finally the time after the injury and surgery when BISD failed to conduct any meaningful investigation, continuing their deliberate indifference, so that Kevin DeShay was unable to return to school in a safe environment. The Fifth Circuit chose not to discuss these separate time periods.

CONCLUSION AND PRAYER

Wherefore, Premises Considered, Plaintiffs pray: for jury hearing hereof; that once Defendants' legal liability has been established, they have jury verdict against Defendants in the capacity stated in their pleadings for the full amount of their damages and thereafter judgment on the jury verdict; for punitive damages in an amount found proper under these facts and

circumstances; for pre-judgment and post-judgment interest at the highest rate allowed by law; for attorney's fees as provided pursuant to 42 U.S.C. §1988; for costs of court and for such other and further relief, special or general, at law or in equity, to which they may show themselves justly entitled, including injunctive relief.

Respectfully submitted

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Counsel of Record for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing were delivered by certified mail to the attorneys for the Defendants, Kelli Hamm Karczewski, and Leonard Schwartz, Schwartz & Eichelbaum, P.C., 800 Brazos, Suite 870, Austin, Texas 78701, Telephone: (512) 476-9944, Facsimile (512) 472-2599, on July 29, 1999.

Tim Mahoney

APPENDIX A - 1

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ALBERTA DeSHAY,	§	
HENRY DeSHAY	§	
INDIVIDUALLY AND AS NEXT	§	
FRIEND FOR THEIR SON,	§	
KEVIN DeSHAY	§	
	§	
v.	§	Cause No. A-95-CA-535
BASTROP INDEPENDENT	§	
SCHOOL DISTRICT. ET AL.	§	

JUDGMENT AND ORDER

Before the Court is Defendants Bastrop Independent School District ("BISD"). Bastrop Special Education Cooperative's ("BSEC") and the Individual Defendants'[1] Motion for Summary Judgment filed on October 2, 1997(Clerk's Docket No. 88). The Plaintiffs, Alberta and Henry DeShay, individually and as next friend for their son, Kevin DeShay, filed their Response on November 10,1997 (Clerk's Docket No.112). The Defendants filed a Reply on December 9,1997(Clerk's Docket No.125). The Court heard oral arguments from all parties on December 11, 1997. The

[1]Paul Fleming, Vera Long, Margaret Ryan, and Unknown employees of BISD and BSEC in their official capacities.

Plaintiffs' filed a Supplement to their Response on December 31, 1997 (Clerk's Docket No.130).

I. GENERAL BACKGROUND

The following facts are not disputed. Plaintiff Kevin DeShay is a severely mentally and physically handicapped student in BISD's special education program. Kevin was admitted to the special education program at the age of six and was placed in a self-contained class for severe and profoundly handicapped students. Kevin is completely wheelchair dependent and has little or no voluntary control over his bodily functions. Kevin has also been diagnosed with severe osteoporosis.

On the morning of September 15, 1993[2], Kevin's father dropped Kevin off at his special education classroom at BISD. Later that morning, Kevin's teacher, Helen Smith, attempted to clear Kevin's chest congestion by rolling him on a therapy ball. Sometime thereafter, Ms. Smith noticed

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[2]Kevin was then 15 years of age.

that Kevin was experiencing pain in his hips and/or legs. Ms. Smith summoned the campus nurse, Margaret Ryan, to examine Kevin. Nurse Ryan attempted to contact Kevin's parents to inform them of Kevin's discomfort. Nurse Ryan and other school officials, however, were unable to reach Kevin's parents at this time. At approximately 3:45 p.m., Kevin's brother, Perry, arrived at the school to take Kevin home. Perry was advised that Kevin was in discomfort and should be taken to the doctor. Later that day Kevin's parents took Kevin to the doctor who determined that beth of Kevin's legs were broken. Plaintiffs contend that Kevin's legs were broken earlier that day during the therapy ball exercise.

Plaintiffs Alberta and Henry DeShay, both in their individual capacities and on behalf of their son, originally filed their Complaint on August 23, 1995, alleging causes of action arising under (1) 42 U.S.C. § 1983; (2) Section

504 of the Rehabilitation Act of 1 973[3]; (3) Family Educational Rights and Privacy Act of 1974 ("FERPA"); and (4) the Texas Open Meetings Act[4]. On November 8, 1996, this Court granted the Defendants Motion to Dismiss Plaintiffs' § 1983 claims against the individual defendants in their individual capacities. The Court denied the Motion to Dismiss the claims against the institutional defendants.

II. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendants argue that they are entitled to summary judgment on the § 1983 claim because Plaintiffs are unable to show that a constitutional injury was caused by an "official policy" or "custom" of BISD. Defendants also contend that they are entitled to summary judgment with regard to the §504 claim because the Plaintiffs are unable

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[3]Plaintiffs filed an amended complaint on July 10, 1996, adding the §504 and FERPA claims.

[4]On August 1, 1997, the Plaintiffs filed their third amended complaint alleging that the Defendants violated the Texas Open Meetings Act. The Plaintiffs also dropped their remaining claims against the Individual Defendants in their individual capacity at this time. In addition, the Plaintiffs dropped Helen Smith from the lawsuit entirely.

to show that BISD intentionally discriminated against Kevin. In addition, Defendants contend that they are entitled to judgment on the Family Rights and Privacy Act claim because the Plaintiffs (1) never made a request under the Act; (2) received an adequate hearing; (3) are unable to show that there were any records in existence to which they were not allowed access; and (4) are unable to show that their FERPA rights were violated pursuant to an official policy or custom. Lastly, Defendants contend that the Texas Open Meeting Act claim is without merit since the district did complete a certified agenda as is required by the Act.

III. STANDARD OF REVIEW

Summary judgment is appropriate under Rule 56(c) of the Federal Rules of Civil Procedure only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of

law." FED. R. CIV. P.56(c). The party seeking sumrnary judgment bears the burden of showing that there is an absence of evidence to support the nonmovant's case. *Celotex Corp. v. Catrett,* 106 S.Ct. 2548, 2553-54 (1986); *Colemon v. Houston Independent School District,* 113 F.3d 528,533(5th Cir. 1997). After a proper motion for summary judgment is made, the non-movant must set forth specific facts showing that there is a genuine issue of material fact for trial. *Anderson V. Liberty Lobby, Inc.,* 106 S.Ct. 2505,2511 (1986).

The Court views facts in the light most favorable to the non-movant and draws all reaaonable inferences in her favor. *Coleman,* 113 F.3d at 533. If the non-movant sets forth specific facts in support of allegations essential to her claim, a genuine issue of material fact is presented, and summary judgment is inappropriate. Unsupported allegations or affidavit or deposition testimony setting forth ultimate or conclusory facts and conclusions of law are insufficient to defeat a proper motion for summary judgment. *Duffy v.*

Leading Edge Products, Inc,.44 F.3d 308, 312 (5th Cir. 1995)(citing *Anderson v. Liberty Lobby, Inc.,* 106 S.Ct at 2509-10)). Rather, the nonmoving party must set forth specific facts showing the existence of a "genuine" issue concerning every essential component of its case. *Lusk v. Foxmeyer Health Corp.,* 129 F.3d 773, 777 (5th Cir. 1997). The standard of review "is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the non-moving party based upon the record before the court. *James v. Sadler,* 909 F.2d 834, 837(5th Cir. 1990)(citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 106 S.Ct. 1348,1356(1986)). Applying these standards, the Court turns to the merits of the motion for summary judgment.

V. ANALYSIS

A. 42 U.S,C. §1983

Plaintiffs allege that they were denied adequate procedural and substantive due process of law. Specifically, Plaintiffs allege that the Defendants violated Kevin's liberty

interest to be free from bodily injury while he was under the custodial care of the school officials. Plaintiffs additionally allege that Defendants, through their deliberate indifference, violated Plaintiffs' right to prompt medical diagnosis, treatment, and care guaranteed by the Fourteenth Amendment. Plaintiffs further contend that they were not provided with adequate notice or hearing concerning the injuries to Kevin. Plaintiffs assert that the above-alleged violations of the Due Process Clause of the Fourteenth Amendment create a cause of action under 42 U.S.C. § 1983 against the Defendants BISD, BSEC, and the Individual Defendants in their official capacities.[5]

Defendants assert that the Plaintiff's § 1983 claim is without merit because they are unable to show that an "official policy" or "custom" of BISD was a cause in fact of the alleged constitutional deprivation. Defendants further assert that the Plaintiffs have falled to produce sufficient

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[5]The Court will hereinafter use "BISD" to refer to all of the Defendants in the case

summary judgment evidence to show that the school district was deliberately indifferent to the rights of the Plaintiffs.

Title 42 U.S.C. § 1983 provides a vehicle for redressing the violation of federal law by those acting under color of state law. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n,* 101 S.Ct. 2615, 2625-26 (1981). Section 1983 provides, in pertinent part, the following:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage. of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983(1994).

The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to

victims if such deterrence falls. *Wyatt v. Cole*, 504 U.S. 158,161 (1992). To state a claim under § 1983, a plaintiff must (I) allege a violation of rights secured by the Constitution or laws of the United States, and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law. *Leffall V. Dallas Indep. Sch. Dist.*, 28 F.3d 521,525(5th Cir. I 994)(quoting *West v. Atkins,* 487 U.S.

42,48 (1988)). In order to State a cause of action under § 1983 for violation of the Due Process Clause, Plaintiffs "must show that they have asserted a recognized 'liberty or property' interest within the purview of the Fourteenth Amendment, and they were intentionally or recklessly deprived of that interest, even temporarily, under color of state law." *Doe v. Taylor Indep. Sch. Dist.,* 15 F.3d 443, 450(5th Cir. 1994), *cert. denied*, 115 S.Ct 70 (1994),(quoting *Griffith v. Johnston*, 889 F.2d 1427, 1435 (5th Cir. 1990), *cert. denied*, 115 S.Ct 712 (1991)). The Fifth Circuit has held that schoolchildren do have a liberty

interest in their bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment See *Doe*, 15 F.3d at 450-452 (holding that the Constitution protects a schoolchild from physical sexual abuse by a public schoolteacher). Thus, Kevin DeShay does have a liberty interest in his bodily integrity that is protected by the Due Process Clause.

However, when a local governmental unit such as BISD is the defendant in a § 1983 cause of action, the Plaintiff must also identify a governmental "policy" or "custom" that caused the plaintiff's injury. *Board of County Commissioners of Bryan County, Oklahoma v. Brown,* 117 S.Ct 1382, 1388 (1997). Local governmental units may not be held liable under § 1983 on a theory of respondeat superior for the actions of its employees. *Id*; *Monell v. Department of Social Services,* 436 U.S. 658, 691 (1978); *Eugene v. Alief Indep. Sch. Dist.*, 65 F.3d 1299 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 1680 (1996). Similarly, supervisory officials may not be held vicariously liable under

§ 1983 for the actions of their subordinates. *Leffall*, 28 F.3d at 525. Any claims against individual Defendants in their official capacity will be treated as claims against the governmental entity involved. *Hafer v. Melo*, 502 U.S. 21,25(1991); *Baker V. Putnal*, 75 F.3d 190, 195(5th Cir.1996).

The first issue that the Court must consider is whether the Plaintiffs have sufficiently identified an "official policy or custom" of BISD that caused the Plaintiffs' injuries. The Fifth Circuit has defined official policy and custom as:

> (I) A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the [district]. . or by an official to whom the [district] ha[s] delegated policymaking authority; or
> (2) A persistent, widespread practice of [district] officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents [district] policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the district or to an official to whom that body had delegated policy-making authority.

Eugene, 65 F.2d at 1304 (quoting *Johnson v. Moore*, 958 F.2d 92,94 (5th Cir. 1992)).

Recently, in Board of County Commissioners of Bryan County, Oklahoma v. Brown, 117S.Ct. 1382 (1997), the Supreme Court discussed the importance of requiring a plaintiff seeking to impose liability on a municipality under § 1983 to identify a policy or custom that caused the plaintiff's injury. Locating a policy ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality. *Id.* at 1388. Similarly, an act performed pursuant to a "custom" that has not been formally approved by an appropriate decision maker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law. *Id.* The Court reasoned that:

As our § 1983 municipal liability

> jurisprudence illustrates, however, Is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.

Id.

Thus, Section 1983 liability may he imposed on the basis of an officially adopted policy or decision only if a governmental policy maker makes a deliberate choice to follow a course of action from among various alternatives. *See also, Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).

In their § 1983 claim, plaintiffs contend that Defendants consciously disregarded and were deliberately indifferent to Kevin's welfare and medical needs. In addition, Plaintiffs allege that the Defendants violated Kevin's right to prompt medical diagnosis, treatment and care. Plaintiffs assert that it 'was BISD's custom and policy

to fail to ensure that their employees had adequate training. Plaintiffs also assert that it was the policy and custom of BISD to have inadequate investigations of alleged violations of the rights of students.

A § 1983 complaint must state specific facts, not simply legal and constitutional conclusions. *Fee v. Herndon*, 900 F.2d 804, 807 (5th Cit. 1990), *cert. denied*, 111 S.Ct. 279(1990). Although Plaintiffs have alleged that BISD had a policy and custom in the aforementioned areas, Plaintiffs have failed to adduce any facts supporting the contention that it was the custom or policy of BISD to fail to ensure that their employees had adequate training or that there was a policy or custom of conducting inadequate investigations. Moreover, Plaintiffs have provided no evidence of an official policy or custom at BISD that instructs teachers to intentionally harm disabled students or to deny medical treatment to students.

At most, Plaintiffs have alleged that an isolated incident of negligent care taking of Kevin occurred. An

isolated incident is not sufficient to show that a custom or policy exists. "Isolated violations are not the persistent, often repeated, constant violations that constitute custom and policy' as required for municipal section 1983 liability." *Campbell v. City of San Antonio*, 43 F.3d 973 (5th Cir. 1 995)(quoting *Bennett v. City of Slidell*, 728 F.2d 762,768 n. 3(5th Cir. 1984), *cert. denied*, 472 U.S. 1016(1985)). The alleged negligence of the teachers and nurses in falling to provide prompt medical care is not a policymaking act by itself, and thus, without evidence of an official policy or custom, plaintiffs' allegation amounts to nothing more than a § 1983 claim on the basis of respondeat superior. Accordingly, the Court finds that Plaintiffs have failed to show the existence of a policy or custom necessary to support their claims under § 1983 against the Defendants.

Deliberate Indifference

The Supreme Coust has held that an official policy or custom may be shown by official inaction reflecting "deliberate indifference" to an individuals protected rights.

City of Canton, Ohio v Harris, 489 U.S. 378, 387 (1989). In *City of Canton*, the Supreme Court recognized that a local governmental unit is liable under 42 U.S.C. § 1983 for a constitutional violation committed by its employee if the violation is caused by the government's fai]ure to adequately train its employees and the failure to train is the result of the government's "deliberate indifference" to a person's constitutional rights. *City of Canton*, 109 S.Ct 1197(1989). The Court stated that "for liability to attach, in this circumstance the identified deficiency in a city's training prograrn must be closely related to the ultimate injury." *City of Canton*, 489 U.S. at 390; *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443,453 (5th Cir.1994), *cert. denied*, 115 S.Ct 70(1994). Before liability may be imposed on this basis, it must be demonstrated that governing officials were aware of the problem and chose to ignore it. *City of Canton*, 489 U.S. at 387. The existence of a policy, without more, is insufficient to trigger local government liability under § 1983. *Gonzalez v. Ysleta Indep. Sch Dist.*,

996 F.2d 745,757 (5th Cir. 1993)(quoting *Oviatt y. Pearce*, 954 F.2d 1470, 1477 (9th Cir. 1992)). The existecce of a pattern of tortious conduct by inadequately trained employees may tend to show that the lack of proper training, rather than a one-time negligent administration of the program or factors peculiar to the officer involved in a particular incident, is the moving force behind the plaintiff's injury. *Bryan County*, 117 S.Ct, at 1390 (citing *City of Canton*, 489 U.S. at 390-391). The Supreme Court has recently made it clear that in *City of Canton* it was referring to a deficient training "program," necessarily intended to apply over a period of time to multiple employees. *Bryan County*, 117 S.Ct. at 1390. The Count reasoned that:

> If a program does not prevent constitutional violations, municipal decision makers may eventually be put on notice that a new program is called for. Their continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the tortious conscious disregard for the consequences of their action-the "deliberate indifference"--necessary to trigger municipal liability."

Bryan County, 117 S.Ct. at 1390;
Thus, in order to demonstrate deliberate indifference the school district must have been aware of an inadequate training program which caused constitutional violations and then chose to ignore the inadequacies.

Plaintiffs assert in their response to the summary judgment motion that "the school district personnel's actions and inactions after the injury amount to 'deliberate indifference' to Kevin's pain and discomfort." Aside from these conclusory allegations, Plaintiffs have failed to adduce any sufficient summary judgment evidence that would tend to establish that BISD's training program was inadequate. Moreover, Plaintiffs have failed to demonstrate that the Defendants had any notice of a training deficiency or of any

injuries to previous students at BISD prior to the incident in question. Without such notice, the Court finds that Defendants could not be deliberately indifferent to Kevin DeShay's injuries.

Procedural Due Process

Plaintiffs allege that they were entitled to proper notice and hearing on Kevin's injuries, and that the Defendants failed to respond to the minimum requirements for such due process. The Fourteenth Amendment prohibits any state deprivation of life, liberty, or property without due process of law. To determine whether an individual's procedural due process of law has been violated, the Court must determine whether the asserted individual interests are encompassed within the Fourteenth Amendment's

Protection of life, liberty or property. *Ingraham v. Wright*, 430 U.S. 651, 672(1977). If protected interests are implicated, the Court then must decide what procedures constitute due process of law. *Id*. As discussed above, Kevin does have a constitutionally protected liberty interest in his bodily integrity.

Courts have generally held that the Constitution requires some kind of a hearing before the State deprives a person of liberty or property. *Zinermon v. Burch*, 494 U.S. 113,127(1990). In some circumstances, however, courts have held that a statutory provision for a post-deprivation hearing, or a common-law tort remedy satisfies due process. *Id*. The Supreme Court has recognized that "either the necessity of quick action by the State or the

impracticality of providing any meaningful pre-deprivation process, when coupled with the availability of some meaningful means by which to access the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process." *Parratt v. Taylor*, 451 U.S. 527, 539(1981). Even assuming that the notice and hearing were inadequate, the Court finds that Plaintiffs have still failed to produce sufficient summary judgment evidence of a custom or policy of inadequate investigations. Plaintiffs have only made conclusory allegations in regard to a custom or policy of inadequate investigations and hearings. Therefore, the Court finds that Plaintiffs have failed to make a sufficient showing which would preclude summary judgment on this issue.

Special Relationship

Plaintiffs also argue that because of the "special relationship" that existed between Kevin and BISD, the Defendants were under a duty to protect Kevin from bodily injury. Plaintiffs are relying on the special relationship doctrine that was established by the Supreme Court in *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 109 S.Ct 998, 1003-04(1989). In *DeShaney*, the Supreme Court recognized an exception to the general rule that a State's failure to protect an individual from private violence does not Constitute a violation of the Due Process Clause. The Court held that a state may have the constitutional duty to protect an individual from private violence if the state, "through incarceration, institutionalization, or other similar

restraint of personal liberty," has limited the individual's freedom to act on her own behalf. *Id.* at 1006. The Fifth Circuit has explained, however, that the DeShaney special relationship exists "only when the state, by its affirmative. exercise of power, has custody over an individual *involuntarily or against his will.*." *Walton v. Alexander*, 44 F.3d 1297, 1303 (5th Cir. 1995)(holding that the special relationship analysis should not be applied in a § 1983 action brought by a student attending a state school for the deaf against the school superintendent for failure to protect the student from sexual assault by a classmate).

The special relationship doctrine, however, is properly invoked in cases involving harms inflicted by third parties, and it is not applicable when it is the conduct of a

state actor that has allegedly infringed on a person's constitutional rights. Because this case involves the conduct of a state actor and not a private actor, the special relationship analysis is inapplicable.[6] Therefore, the Court finds that Plaintiffs' § 1983 claim based on the special relationship analysis is without merit.

In summary, Plaintiffs have failed to present sufficient summary judgment evidence supporting any of the above grounds for recovery under § 1983. Plaintiffs have merely stated conclusory allegations and have failed to present specific facts supporting their § 1983 claim against the Defendants. Plaintiffs' claim amounts only to an allegation of simple negligence, which is not actionable

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[6]The Court addressed the merits of the Due Process Clause claims above.

under § 1983. Therefore, summary judgment on the § 1983 claims against Defendants BISD, BSEC, and the Individual Defendants Fleming, Long, Ryan and Unknown Employees in their official capacity is HEREBY GRANTED.

B. Section 504 of the Rehabilitation Act

Plaintiffs allege Kevin, on the basis of his handicap, was excluded from participation in, denied the benefits of, and otherwise was subjected to discrimination under the programs and activities provided by BISD and BSEC in violation of § 504 of the Rehabilitation Act of 1973. 29 U.S.C. § 794 (Supp. 1997). Plaintiffs allege that Defendants intentionally provided Kevin with medical care that was not as effective as that provided to other non-handicapped students in violation of §504 of the

Rehabilitation Act. In addition, Plaintiffs allege that Kevin did not enjoy the rights, privileges, advantages, or opportunities enjoyed by non-handicapped students in violation of § 504 of the Rehabilitation Act

Defendants argue that Plaintiffs have failed to produce sufficient summary judgment evidence to show that Defendants intentionally discriminated against Kevin.

Section 504 of the Rehabilitation Act provides, in part, that:

> No otherwise qualified individual with a disability in the United States . . ., shall, solely by reason of her or his disability, be excluded from the participation in, he denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794. (Supp. 1997).

The Act is intended to ensure that individuals with disabilities receive the same treatment as those without disabilities. *Chandler v. City of Dallas*, 2 F.3d 1385, 1389 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1386(1994). To qualify for relief under the Statute, a plaintiff must prove that (I) he was an "individual with a disability"; (2) he was "otherwise qualified"; (3) he was enrolled in a program or activity" that received federal financial assistance; and (4) he was adversely treated solely because of his handicap. *Hileman v. City of Dallas, Texas*, 115 F.3d 352(5th Cir. 1997). The burden of proof for each of these elements lies with the plaintiff. *Chandler*, 2 F.3d at 1389.

Plaintiffs have met the first three eletnents listed above. However, Plaintiffs have failed to produce, any

summary judgment evidence showing that Kevin was adversely treated or that he was discriminated against "solely because of his handicap." Plaintiffs base their § 504 complaint on the deposition of one employee who testified that because Kevin could not communicate, there was no way of knowing that his legs were broken. This alone is not sufficient summary judgment evidence to show that the defendants discriminated against Kevin solely because of his handicap. Accordingly, the Court finds that Defendants are entitled to summary judgment on the § 504 claim.

C. Family Educational Rights and Privacy Act of 1914

Plaintiffs have asserted that Defendants violated the Family Educational Rights and Privacy Act of 1974 (hereinafter "FERPA"). 20 U.S.C. § 1232g (1990 & Supp.

1996), by not providing Kevin's parents, Henry and Alberta DeShay, with information and documents concerning Kevin's injuries. Plaintiffs further assert that they were entitled to a hearing and an opportunity to correct or delete any inaccurate, misleading, or otherwise inappropriate data.

Defendants claim that Plaintiffs were given sufficient access to Kevin's records and were provided an adequate hearing in accordance with FERPA. Defendants assert that they are entitled to summary judgment because the Plaintiffs cannot show that the alleged violation was made pursuant to a policy or custom of BISD.

FERPA grants parents of students and adult students attending post-secondary educational institutions the right of access to the students education records. 20 U.S.C. §

1232g (1990 & Supp. 1997). The Act also requires educational institutions to afford parents of students and adult students the opportunity to challenge a student's education records in order to insure that the records are not inaccurate, misleading, or in violation of the student's privacy or rights. 20 U.S.C. § 1232g(a)(l) (1990 & Supp. 1997).

The Fifth Circuit has found that there is no private cause of action under FERPA. *Tarka v. Cunningham,* 917 F.2d 890, 891 (5th Cir. 1990). However, an action under 42 U.S.C. § 1983 may nevertheless be premised on an alleged violation of FERPA rights. *Id.* Therefore, in order to maintain a cause of action against the Defendants, the Plaintiffs must present sufficient summary judgment

evidence showing that an "official policy or custom" of BISD caused the violation of FERPA rights. *Monell*, 98 S.Ct. at 2035-36; *Maynard v. Greater Hoyt School Dist.*, 876 F.Supp. 1104, 1108 (D. S.D. 1995). Plaintiffs have failed to present any summary judgment evidence showing that BISD had a policy or a custom of violating FERPA. Unsupported allegations or affidavit or deposition testimony setting forth ultimate or conclusory facts and conclusions of law are insufficient to defeat a proper motion for summary judgment. *Duffy v. Leading Edge Products, Inc,*.44 F.3d 308, 312 (5th Cir. 1995). Therefore, the Defendants' Motion for Summary Judgment on the FERPA claim is GRANTED.

D. Texas Open Meetings Act

Plaintiffs allege that the Defendants "violated the Texas Open Meetings Act by not noticing the public of meetings of policy-makers, management boards, and holding Board meetings closed to the general public, indeed closed to members of the DeShay family, contrary to the provisions of the Act, and/or without the basic requirements for a tape recording and/or certified agenda of the closed meeting." *Plaintiff's Third Amendend Complaint, p.15.*

The puppose of the Texas Open Meetings Act (hereinafter "TOMA") is to protect the public's interest in knowing the workings of its governmental bodies. *Cox Enterprise, Inc. v. Board of Trustees of Austin I.S.D.,* 706 S.W.2d 956, 960 (Tex. 1986). As the Texas Supreme Court has observed, citizens "are entitled not only to know

what the government decides but to observe how and why every decision is reached. The explicit command of the statute is for openness at every stage of the deliberations." *Acker v. Texas Water Commission*, 790 S.W.2d 299,300 (Tex. 1990). With certain exceptions, the TOMA provides that every "regular, special, or called meeting of a governmental body shall be open to the public." TEX. GOV'T CODE ANN. § 551.002 (Vernon 1994).

A governmental body may convene in executive session (referred to as a "closed meeting" in the revised TOMA) only where specifically authorized by law. Op. Tex. Att'y Gen. No. LO 94-063. For example, a governmental body may confer with city employees in a closed meeting if the meeting's only purpose is to receive information from

or to ask questions of the city employees. TEX. GOV'T CODE ANN. § 551.075 (Vernon 1994). Moreover, a govemmental body may conduct a closed meeting to bear a complaint or charge against an office or employee. *Id.* at §551.074. In addition, the Act does not require a school board to conduct an open meeting to deliberate a case: (1) involving discipline of a public school child; or (2) in which a complaint is brought against an employee and the complaint or

charge directly results in a need for a hearing.[7] *Id.* at §551.082. Additionally, a governmental body may conduct

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[7]This subsection doesn not apply if an open hearing is requested in writing by a parent of guardian of the child or by the employee against whom the complaint or charge is brought. TEX. GOV'T CODE ANN. §551.082(b). It is important to note that the Plaintiffs have never contended that Kevin DeShay's parents requested an open meeting under this section.

a closed meeting when it seeks advice of its attorney about: (I) pending or contemplated litigation; or (2) a settlement offer. *Id.* at § 551.071. After a review of the certified agendas at issue, the Court finds that all of the closed meetings at issue fell into one of the exceptions contained in sections 551.071-084 of the TOMA. The Plaintiffs have failed to produce sufficient summary judgment evidence to support their claim that the Defendants violated the Act.

When holding a closed meeting, a governmental body must either keep a certified agenda or make a tape recording of the proceedings, except for a consultation with the City Attomey under § 551.071. TEX. GOV'T CODE ANN. § 551.103 (Vernon 1994). This provides a method of verifying in court proceedings that closed meetings comply

with the TOMA. *Finlan v. City of Dallas*, 888 F.Supp. 779, 783 (N.D.Tex. 1995). The certified agenda must include: (1) a statement of the subject matter of each deliberation; (2) a record of any further action taken; and (3) an announcement by the presiding officer at the beginning and the end of the meeting indicating the date and time. TEX. GOV'T CODE ANN § 551.103 (Vernon 1994).

When a closed meeting is permitted under the TOMA, the governmental body must first convene a quorum of the body in an open meeting, for which proper notice has been provided, and during which the presiding member publicly announces that a closed meeting will be held, and identifies under which section of the TOMA the closed meeting will be held. TEX. GOV'T CODE ANN § 551.101 (Vernon

1994). The advance notice should specifically and fully disclose the subjects to be considered at the upcoming meeting. *Cox Enterprises, Inc.*, 706 S.W.2d at 959-60.

The Defendants opted to keep a certified agenda of the closed meetings at issue in this case which is entirely proper under § 551.103 ofthe Act. After a careful review of the certified agendas at issue, the Court finds that the Defendants fully complied with all of the aforementioned requirements of the Act in regard to conducting closed meetings and keeping certified agendas. The Plaintiffs have failed to produce sufficient summary judgment evidence to support their claim that the Defendants violated the Act. Accordingly, Defendants Motion for Summary Judgment on this claim is GRANTED.

E. Conclusion

In summary, the Court finds that there are no issues of material fact with respect to Plaintiffs' claims under § 1983, § 504 of the Rehabilitation Act, the Family Educational Rights and Privacy Act of 1974, and the Texas Open Meetings Act Accordingly, Defendants' Motion for Summary Judgment is GRANTED as to all of Plaintiffs' claims.

SIGNED this the 7th day of January, 1998, at Austin, Texas.

/S/ Alan D. Albright
Alan D. Albright
United States Magistrate Judge

APPENDIX B - 1

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 98-50385

U.S. COURT OF APPEALS
FILED
APRIL 16, 1999
CHARLES R. FULBRUGE III
CLERK

ALBERTA DESHAY, Individually and as next friend of her son Kevin O. Deshay; HENRY DESHAY, Individually and as next friend of his son Kevin O. Deshay,

Plaintiffs-Appellants,

versus

BASTROP INDEPENDENT SCHOOL DISTRICT; BASTROP SPECIAL EDUCATION COOPERATIVE; PAUL H. FLEMING; VERLA LONG, MARGARET RYAN; HELEN SMITH; UNKNOWN EMPLOYEES, of the Bastrop Independent School District and Bastrop Special Education Cooperative, in their individual and official capacities.

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

Before KING, Chief Judge, REAVLEY and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

[1]Pursuant to 5th CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

Alberta and Henry DeShay seek review of an adverse summary judgment dismissing their claims against Bastrop Independent School District and other defendants (individually and collectively, BISD), the 12(b)(6) dismissal of claims against several state employees in their individual capacities, and various interlocutory rulings of the district court. We affirm.

This court reviews the grant of a motion for summary judgment *de novo*, reading the facts and all reasonable factual inferences in the light most favorable to the nonmovant. *See Coleman V. Houston Indep. Sch. Dist.*, 113 F.3d 528,535 (5th Cir. 1997). To resist summary judgment, the nonmovant must raise a genuine issue of material fact for trial. *See Anderson V. Liberty Lobby, Inc.*, 477 U.S. 242,250 (1986).

A. 1983 claims.

There is no respondeat superior liability of a municipality for its employee's negligent or grossly negligent conduct. *See Monell V. Department of Social*

Servs., 436 U.S. 658, 691 (1978). However, the DeShays may proceed against BISD on two section 1983 theories. First, they may attempt to demonstrate the existence of an official custom or policy, which is satisfied if the conduct of BISD employees is so persistent and widespread that it rises to the level of custom and a BISD policymaker actually or constructively knew about the custom. *See Bennett V. City of Slidell,* 735 F.2d 861, 862(5th Cir. 1984) (en banc). Alternatively, the DeShays can show that the BISD, as a result of its "deliberate indifference" to Kevin DeShay's constitutional rights, failed to adequately train its employees. *See City of Canton V. Harris,* 489 U.S. 378, 387-88 (1989). BISD acted with deliberate indifference if it overlooked inadequacies in a training program of which it was actually or constructively aware. *See, e.g., Board of County Comm 'rs V. Brown,* 117 S. Ct. 1382, 1390(1997). Any such known custom or deliberate indifference must have actually caused Kevin's injuries.

See Harris, 489 U.S. at 389.

The DeShays cannot satisfy either theory. The DeShays argue that school employees readily ignored a number of school policies after Kevin was injured. There is no showing that this disobedience was so widespread and persistent as to rise to the level of custom. Further, none of the BISD policies to which the DeShays cite, even if they were customarily ignored by school staff, actually caused Kevin's injuries. As such, the district court correctly determined that, when read in the light most favorable to the DeShays, the summary judgment evidence shows at most "an isolated incident of negligent caretaking," which is not actionable under section 1983. Our decision in *Grandstaff v. City of Borger,* 767 F.2d

161(5th Cm 1985), is not to the contrary. In *Grandstaff* 'we held that episodes of dangerous recklessness - including a repeated and wanton barrage of police gunfire in the direction of an innocent bystander, which took his life - satisfied the necessary condition that policymaking authorities were constructively aware of a prevalent custom among the officers to disregard human life and safety, because the policymaker followed these remarkable episodes with "no reprimands, no discharges, and no admissions of error." *Id.* at 171. We stated that the policymaker's failure to react "to so gross an abuse of the use of deadly weapons says more about the existing disposition of the City's policymaker than would a dozen incidents where individual officers employed excessive

force. . . . [T]he subsequent acceptance by the policymaker tends to prove his preexisting disposition and policy" *Id*. The inference justified in *Grandstaff* does not surface under the summary judgment facts presented in this case. The BISD staff's procedural mistakes after discovering Kevin's discomfort and when investigating the episode, cited by the DeShay's as a prevalent custom of violating BISD policy, does not support an inference that the staff acted with dangerous recklessness because they feared no authoritative retribution or recognized that the policymaking authority in fact condoned such recklessness. The BISD staff operated under no implied guarantee that they would not be held accountable if they should grossly fail at their duties. Further, the practice of

rolling a student upon a therapeutic medicine ball, although perhaps negligent when that student is severely asteoporotic, does not constitute the sort of grave and dangerous recklessness epitomized by the actions of the Borger City police force in *Grandstaff*. As such, we disagree that BISD's subsequent investigatory missteps prove a preexisting policy, or as the DeShays allege, a "dangerous environrnent," which in turn caused an injury to DeShay's protected constitutional rights.

The DeShays also allege that the school was on notice that its special education employees were inadequately trained and that it failed to respond to the inadequacy, in this way demonstrating deliberate indifference to Kevin's constitutional rights. Only one

piece of the summary judgment evidence could support the DeShays' assertion. In 1991, an OCR investigation found that BISD had failed to properly identify a student with asthma as someone requiring accommodation. The DeShays conclude from this that BISD should have known that its special education staff was inadequately trained and was required under section 1983 to address the inadequacy. Even read in the light most favorable to the DeShay's, this single example of a failed diagnosis does not indicate that the special education staff as a whole is insufficiently trained such that the BISD could be found to have been deliberately indifferent to Kevin's rights.

The DeShay's assertion that the school's insufficient

investigation violated the due process clause, actionable under section 1983, must also fail. "[T]he due Process Clause is simply not implicated by a negligent act of an official causing *unintended* loss or injury to life, liberty or property. *See Daniels V. Williams,* 474 U.S. 327, 328 (1986) (second emphasis added). Each procedural oversight cited in the DeShays' brief possibly constituted a negligent investigatory shortfall, but none rises to the level of an intentional injury.

B. Rehabditation Act claim.

The Rehabilitation Act of 1974 ensures that the medically disabled receive equal treatment from federally funded programs and activities. *See Chandler v. City of Dallas,* 2 F.3d 1385, 1389-90 (5th Cir. 1993). The only

issue for dispute in this case is whether Kevin was treated adversely *intentionally* and *solely* because of his disability. *See Hileman v. City of Dallas,* 115 F.3d 352,353(5th Cir. 1997) (requiring adverse treatment resulting solely from the complainant's disabled status); *Marvin H. v. Austin Indep. Sch. Dist.*, 714 F.2d 1348, 1357 (5th Cir. 1983) (requiring intentional discrimination).

The DeShays argue that BISD's failure to adopt a procedure for communicating with students like Kevin who cannot speak demonstrates intentional adverse treatment, but for which Nurse Ryan would have properly treated Kevin's injury. Ryan acknowledged in her deposition that she would have sought emergency medical attention had Kevin been able to communicate

the extent of his injuries to her. There is no evidence, however, that the school forbore from promulgating a policy for communicating with noncommunicative students solely because of an intent to discriminate against such students. The mere lack of this policy, standing alone, does not suffice, The DeShays further allege that, because BISD knew that Kevin could not verbally communicate, it should have had in place a special procedure for providing emergency care to Kevin ifhis parents could not be reached. BISD's failure to address in advance the possibility that Kevin's parents might not be available at a time when Kevin displays inconclusive signs of discomfort does not support the inference that BISD intentionally discriminated against

Kevin solely because of his impairment. The district court did not err when it dismissed the DeShays' Rehabilitation Act claim at summary judgment.

C. Family Educational Rights and Privacy Act claim.

A section 1983 action may be premised upon a widespread municipal policy or custom of violating rights secured by FERPA. See *Monell*, 436 U.S. at 690-91; *Tarka v. Cunningham*, 917 F.2d 890, 891 (5th Cir. 1990). The Deshays allege that BISD's custom of ignoring its own policies supports the FERPA claim. The summary judgment evidence provides no indication that BISD restricted the DeShays' access to records covered by FERPA according to a prevalent and widespread policy or custom. The district court properly granted summary

judgment favoring BISD on this claim.

D. Texas Open Meetings Act claim.

TOMA specifically authorizes BISD to meet in closed session for various purposes, including personnel matters and conferences, deliberations over complaints brought against employees, pending or contemplated litigation, and settlement offers. See TEX. GOV'T CODE ANN. §§ 551.071-.084 (Vernon 1994). The meetings in this case were called to address the DeShays' complaints against the BISD special education and investigatory staff. The DeShays never requested an open meeting. Alberta Deshay's August 9 letter merely requested that an appeal of the Superintendent's determination be placed on the Board of Trustees's agenda. There is no record that the DeShays timely objected to the Board's decision to hear the matter in executive session. *Cf. United Indep. Sch. Dist. v. Gonzalez,* 911 S.W.2d 118,127 (Tex. App-San Antonio 1995), *writ denied per curiam,* 940 S.W.2d

593 (Tex. 1996). Further, the argument that their request for an appeal should constitute a request for an *open* hearing was not raised in the district court and put forward before this court for the first time only in the Appellants' reply brief. *See Webb V. Investacorp, Inc.*, 89 F.3d 252, 257 n.2 (5th Cir. 1996) (stating that this court usually will not review a matter that was not first presented to the district court and that issues not raised and argued in the initial brief on appeal are waived). BISD was entitled to close the meetings, and the district court correctly dismissed the TOMA claim.

E. Additional claims.

The district court did not abuse its discretion when it refused to order a medical examination of Smith, who is not a party, under Federal Rule of Procedure 35. The

DeShays have not demonstrated any good cause for submitting Smith to a psychological examination. Similarly, the district court did not abuse its discretion when it refused to order BISD to turn over copies of certified agendas under TOMA. These agendas fall under the exception for hearing claims brought against BISD officers or employees. See TEX. GOV'T CODE ANN. § 551.074(2) (Vernon 1994). Finally, the district court did not err when it dismissed the claims against several of the defendants in their individual capacities. We review this 12(b)(6) dismissal *de novo*, applying the same standard as the district court. *See Eason v. Holt,* 73 F.3d 600,601(5th Cir. 1996). Qualified immunity protects public officials from civil liability unless the defendants violated constitutional rights that are clearly-established and their conduct was objectively unreasonable. *See Eugene v. Alief Indep. Sch. Dist.,* 65 F.3d 1299, 1305 (5th Cir. 1995). Review of the DeShays' pleadings do not reveal that the actions of the individual defendants in

caring for DeShay and failing to seek emergency treatment constitute an objectively unreasonable deprivation of Kevin's right to be free from injury while in BISD's care. Thus, the dismissal of the individual defendants under the doctrine of qualified immunity was proper.

AFFIRMED.

APPENDIX C - 1

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 98-50385

ALBERTA DESHAY, Individually and as next friend of her son Kevin O. Deshay; HENRY DESHAY, Individually and as next friend of his son Kevin O. Deshay

Plaintiffs - Appellants

v.

BASTROP INDEPENDENT SCHOOL DISTRICT; BASTROP SPECIAL EDUCATION COOPERATIVE; PAUL H FLEMING; VERIA LONG; MARGARET RYAN; HELEN SMITH; UNKNOWN EMPLOYEES, of the Bastrop Independent School District and Bastrop Special Education cooperative, in their individual and official capacities

Defendants - Appellees

Appeal from the United States District Court for the Western District of Texas, Austin

ON PETITION FOR REHEARING

Before KING, Chief Judge, REAVLEY and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ Norman M. Reavley
United States Circuit Judge

U.S. COURT OF APPEALS
FILED
May 17, 1999
Charles R. Fulbruge III
Clerk

Supreme Court, U.S.
FILED
SEP 7 1999
OFFICE OF THE CLERK

No. 99-233

In The

Supreme Court of the United States

ALBERTA DESHAY, et al.,

Petitioners,

v.

BASTROP INDEPENDENT SCHOOL DISTRICT, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether a severely handicapped child, who is unable to care for or protect himself, "voluntarily" enrolled in a federally funded secondary school program, has fewer constitutional rights than a person confined in a prison or a mentally retarded person confined in a state school or hospital.

This question asks the Court to give meaning to the "shock the conscience" standard" [sic] for substantive due process claims set forth in *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 112 S.Ct. 1061 (1992).

II. Whether a severely handicapped child, if he has rights comparable to a person confined in a prison or a mentally retarded person confined in a state school or hospital, including the right to bodily integrity, who is severely injured at a federally funded secondary school, and the acts leading to those injuries are in violation of the child's constitutional rights, should those acts be measured on the "totality of the circumstances", including acts before and after the child's initial injuries.

There is a difference in the Circuits as to the application of post-incident events to determine policy or custom. The Fifth Circuit under *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987), and as demonstrated in this case, is limiting such application to outrageous police conduct involving the wanton use of guns on hapless citizens who are killed, and will not be applied to life threatening injuries by governmental agents to helpless citizens who are in the custody of governmental agencies such as BISD. The First Circuit, on the other hand, has cited the *Grandstaff* decision in *Roma Construction Co. v. Arusso (sp.)*, 96 F.3d 566, paragraph 59,

QUESTIONS PRESENTED – Continued

(1st Cir. 1996) in support of the proposition that in a municipal setting "a fact finder could conclude that extortion of outsiders, businessmen, or developers, if proven, was 'the way things are done and have been done' in the Town." Such analysis is applicable to all the § 1983 related issues regarding Appellants' case, and if applied to the totality of the circumstances, the Supreme Court should reverse the decisions of the Courts below.

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BRIEF IN OPPOSITION

Respondents Bastrop Independent School District, Bastrop Special Education Cooperative, Paul H. Fleming, Verla Long, Margaret Ryan, and unknown employees of the Bastrop Independent School District and Special Education Cooperative, in their official capacities, respectfully request that Petitioner's Writ of Certiorari be denied, and that this Court affirm the judgment of the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment of the United States District Court for the Western District of Texas, Austin Division, granting Respondent's Motion for Summary Judgment.

STATEMENT OF THE CASE

With the exception of petitioner's occasional inflammatory characterizations,[1] respondents do not dispute petitioner's statement of the case, as it accurately outlines the procedure thus far and the claims asserted by the petitioner in the lower courts.

[1] Characterizations such as "obvious" discomfort; "potentially life threatening" compound fractures; "conspiracy to hide" the injury; the board gave "complete approval" of the acts of personnel; and so on. Respondents additionally dispute that the record reflects any admission by Nurse Ryan that emergency care would have been summoned "had Kevin been able to communicate." The Record, Ryan's Deposition at 146.

ARGUMENT AND REASONS FOR DENYING WRIT

I. No compelling reason exists for granting certiorari; *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) is determinative of the issue of "shock the conscience."

Petitioner asks the United States Supreme Court to accept a petition for certiorari to "give meaning to the 'shock the conscience' standard" for substantive due process claims. Petition for Writ of Certiorari, p. 8 (hereafter "Petition.") "In the wake of *Collins*", Petitioner explains, referring to *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115 (1992), "lower federal and state courts have struggled" with this substantive due process issue. *Id.* While Respondents dispute that there has been any matter of conflict between the lower circuits (certainly there have been no two circuits differing on a similar set of facts),[2] the issue is nonetheless resolved by the Supreme Court's

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[2] It appears as if petitioner has simply cited any and all cases that reference the phrase "shock the conscience" without regard to their application. For instance, petitioner cites to a case involving a *procedural* due process violation, *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110 (Jan. 17, 1995), a case that has been *reversed* by this Court, *Branch v. Turner*, 37 F.3d 371 (8th Cir. 1994), *rev'd sub nom. Goeke v. Branch*, 514 U.S. 115 (1995) (per curiam), a case alleging a substantive due process violation based on economic damages, *Interport Pilots Agency, Inc. v. Sammis*, 14 F.3d 133 (2nd Cir. 1994), public housing funds, *LRL Properties v. Portage Metro Hous. Auth.*, 55 F.3d 1097 (6th Cir. 1995), tort violations, *Skinner v. City of Miami, Fla.*, 62 F.3d 344 (11th Cir. 1995), *cert. denied*, 520 U.S. 1165 (Apr. 14, 1997), and other cases that do not involve a pure substantive due process claim; e.g., *Leffall v. Dallas Independent School District*, 28 F.3d 521 (5th Cir. 1994).

pronouncement six years after *Collins* in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), clarifying and solidifying application of the "shock the conscience" standard to Section 1983 substantive due process causes of action.

The Supreme Court in *Lewis* seized the opportunity to remind its constituents that the Fourteenth Amendment is not a vehicle for tort reprieve; "[w]e have made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm." *Lewis*, 523 U.S. 833 at 842. Rather, substantive due process claims are supported by "conduct intended to injure." *Id.* This intentional behavior is what is "most likely to rise to the conscience-shocking level," thereby illustrating the requisite arbitrary action violative of the Fourteenth Amendment. *Id.*

The facts of *Lewis* are textbook Section 1983: high speed police chase resulting in death. Similar to many other Section 1983 cases, the facts of *Lewis* present more than mere negligence, but less than an intentional act. Certainly, there have been some instances where deliberate indifference by the state actor was sufficient conscience-shocking behavior to invoke Section 1983 liability. *See City of Revere v. Massachusetts Gen. Hospital*, 463 U.S. 239, 244 (1983); cf. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). (Deliberate indifference to the medical needs of pre-trial detainees). However, whether the requisite level of "shock the conscience" is met when the mental state of intent is not present, is a matter to be determined on a case-by-case basis. There is no "mechanical application," explained this Court. Rather, lower courts are to examine

the context and circumstances of the injury before assigning a "shock the conscience" label to every act of deliberate indifference. In *Lewis*, because the police officer's intent was to do his job, not to cause harm or kill, no cause of action existed. "[O]nly a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the shocks-the-conscience test." *Lewis*, 523 U.S. 833.

Here, Petitioner's substantive due process cause of action revolves around a claim of "custom of ignoring school policy," which, according to Petitioner, has created "an environment in which special education children are at risk of receiving grossly inadequate care." Petition, p. 7. Assuming for purposes of this appeal that Kevin's legs were broken at school,[3] the summary judgment evidence simply does not support a finding that the injury was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Lewis*, 523 U.S. 833 at 834, n. 8. Certainly, there was no "purpose to cause harm unrelated to [the administration of therapy.]" *Lewis*, 523 U.S. 833 at 840. The act of breaking Kevin's legs is negligence, at most. "Liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Id.* at 842.

The standard set out in *Collins v. City of Harker Heights* and later clarified by this Court in *County of Sacramento v. Lewis* has been applied by the circuit courts, without difficulty, to the myriad of fact situations involved in Section 1983 litigation; *see, e.g., Wilkinson v. Russell*, No. 98-7663, 1999 WL 395990 (2nd Cir. 1999);

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[3] The summary judgment evidence on this point is speculative support for Petitioner's theory.

Davis v. Township of Hillside, No. 98-6176, 1999 WL 639927 (N.J. 1999); *Hawkins v. Freeman*, 166 F.3d 267 (4th Cir. 1999) (opinion vacated upon granting of rehearing *en banc*); *Khan v. Gallitano*, 180 F.3d 829, 836 (7th Cir. 1999); *S.S. v. McMullen*, No. 98-1732, 1999 WL 512176, at *7-*8 (8th Cir. 1999) ("Lewis explored the continuum of 'deliberately indifferent' conduct and held that deliberate indifference that shocks (the conscience) in one environment may not be so patently egregious in another"); *Singleton v. Cecil*, 176 F.3d 419 (8th Cir. 1999) (*en banc*); *Taylor v. City and County of San Francisco*, 166 F.3d 344 (9th Cir. 1999); *Torres v. Bonilla*, No. 97-55893, 1999 WL 362974 (9th Cir. 1999); *Onossian v. Block*, 175 F.3d 1169 (9th Cir. 1999); *White v. Lemacks*, No. 98-9513, 1999 WL 597409 (11th Cir. 1999); *McElligott v. Foley*, No. 98-3451, 1999 WL 565471 (11th Cir. 1999); *compare Saenz v. Heldenfels Brothers, Inc.*, No. 98-40902, 1999 WL 556440, at *3 (5th Cir. 1999) (Defendant's "decision, while imprudent and ultimately tragic, was not sufficiently willful and targeted toward specific harm to remove the case into the domain of constitutional law.") *with Morris v. Dearborne*, No. 98-40488, at *7-*8 (5th Cir. 1999) ("Applying *Lewis* . . . to the case at bar, we conclude that a teacher's fabrication of sexual abuse against a student's father shocks the contemporary conscience"); and likewise by the trial courts. *See, e.g., Peters v. Houston*, No. 98-1580, 1999 WL 554581 (E.D. Pa. 1999); *Schieber v. City of Philadelphia*, No. 98-5648, 1999 WL 482310 (E.D. Pa. 1999); *Weaver v. Tipton County, Tenn.*, 41 F. Supp. 2d 779 (W.D. Tenn. 1999); *Feist v. Simonson*, 36 F. Supp. 2d 1136 (D. Minn. 1999); *Babbar v. Ebadi*, 36 F. Supp. 2d 1269 (D. Ka. 1998); *El Dia, Inc. v. Rossello*, 30 F. Supp. 2d 160 (D. Puerto Rico 1998).

No compelling reason exists to grant the Petition for Certiorari.

II. The United States Supreme Court denied certiorari in *Grandstaff v. City of Borger*; there is no compelling reason for this Court to re-visit the issue of post-incident events and Section 1983 liability.

Petitioner asserts that there is a "difference in the circuits as to the application of post-incident events to determine policy or custom." Petition, p. 14. The difference, Petitioner contends, lies in the Fifth Circuit's refusal to find custom outside the arena of police misconduct. Specifically, Petitioner states that the Fifth Circuit, "as demonstrated in this case," is "limiting such application to outrageous police conduct involving the wanton use of guns on hapless citizens who are killed." *Id.* The Fifth Circuit, of course, has not – in this case or any other – limited its application of post-incident events determining policy or custom to police misconduct. Rather, *Grandstaff* applies in all instances when there is "subsequent acceptance" by a policy maker to "gross abuse." *Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987). That acceptance, explained the court, proves a preexisting disposition and, hence, policy or custom. The Fifth Circuit has never said that the "gross abuse" must occur in the police setting; those just happened to be the facts of *Grandstaff*.

Grandstaff v. City of Borger involved a cause of action brought by the estate of James Grandstaff against the City of Borger and its police officers under Texas law and Section 1983 after the officers mistook Mr. Grandstaff for

a fugitive and killed him. Although there was no evidence of prior misconduct on the part of the police force or prior knowledge and state of mind of the police chief, the Fifth Circuit Court of Appeals nonetheless found the existence of a policy of indifference to human life at the time of the fatal shooting. In doing so, the panel cited to the number of abusive acts in one night by the officers and the corresponding reaction of the police chief – no reprimands, no discharges, no admissions of error and no policy changes. The Court of Appeals concluded, "[t]his reaction to so gross an abuse of the use of deadly weapons says more about the existing disposition of the City's policymaker than would a dozen incidents where individual officers employed excessive force. The policymaker's disposition, his policy on the use of deadly force, after August 11 was evidence of his disposition prior to August 11." *Id.* at 171.

Since *Grandstaff,* the Fifth Circuit has had opportunities to find policy or custom when looking at "post-incident" behavior of policymakers in a variety of cases, *including those involving police misconduct,* and has declined to do so. The cases that follow *Grandstaff* emphasize that the holding in *Grandstaff* is limited to its highly peculiar set of facts and its analysis can be applied only to equally extreme factual situations. *See Coon v. Ledbetter,* 780 F.2d 1158, 1161 (5th Cir.1986); *Stokes v. Bullins,* 844 F.2d 269, 274 n.8 (5th Cir.1988); *Palmer v. City of San Antonio,* 810 F.2d 514, 516 (5th Cir.1987). The opinion most akin to this fact pattern is *Thompkins v. Belt,* 828 F.2d 298 (5th Cir.1987), a case involving the denial of medical treatment to an inmate. There, the plaintiff attempted to hold the sheriff liable under a theory of supervisory

liability. When ruling in favor of the sheriff policymaker, the *Thompkins* Court recognized that, at most, *Grandstaff* stands for the proposition that a policymaker can be liable in the absence of an overt act only if his, her or its policy *is the moving force* behind the constitutional violation. 828 F.2d at 304.[4] Finding that not to be the case, the panel relied upon the fact that the plaintiff, "adduced no evidence whatever that the jail's treatment system had ever actually failed to deliver necessary and appropriate medical care to any other inmate, or that the [policymaker] was otherwise actually informed or consciously believed that the policy would expose prisoners to substantial risk of significantly unmet serious medical needs. . . . " *Id.* at 305. *Thompkins* reiterated that "the existence of a constitutionally deficient policy cannot be inferred from a single wrongful act." *Id.* at 305.

Similarly, here, there is no evidence that any policy led to the breaking of Kevin's legs. The policy or custom which Petitioner chronicles in his brief to this Court (and all lower courts) is to do nothing *after an injury*. This, again, is a *subsequent act*, or failure to act, on the part of BISD and is not the moving force behind the injury. Even taken as true, the BISD officials' hypothetical knowledge that their failure to rush Kevin to the hospital would be condoned by the board of trustees did not *cause Kevin's legs to be broken*. Petitioner's argument is void of logic. (Compare *Grandstaff*, "[w]here police officers know at the time they act that their use of deadly force in conscious

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[4] A position we maintain is consistent with, and indeed, mandated by this Court's decision in *Board of County Commissioners of Bryan County, Okl. v. Brown*, 520 U.S. 397 (1997).

disregard of the rights and safety of innocent third parties will meet with approval of city policymakers, the affirmative link/moving force requirement is satisfied." 767 F.2d at 170.)

The fact that the First Circuit in *Roma Construction Co. v. aRusso*, 96 F.3d 566 (1st Cir. 1996), concluded that a trier of fact could infer an unconstitutional policy or custom from subsequent acts is not at all inconsistent with *Grandstaff*,[5] but rather follows *Grandstaff*. The importance of *Roma*, if anything, is that (also consistent with *Grandstaff*) the court emphasizes that it is not enough to simply establish policy or custom; the policy must be the moving force behind the violation. The policy must *cause the injury*. *Roma Construction Co. v. aRusso*, 96 F.3d at 575. Petitioner, here, would have faced the same end result in the First Circuit as he did in the Fifth. No compelling reason exists to grant certiorari.

CONCLUSION

The decision of the United States Court of Appeals for the Fifth Circuit in this case is consistent with other circuit's application of Section 1983 and this Court's pronouncement in *County of Sacramento v. Lewis*. The issue of governmental liability for substantive due process claims, even application of post-incident events for purposes of

[5] Of course, the *Roma* court did not apply *Grandstaff* to any particular set of facts, but simply referenced the pleadings (which the reader is not privy) as sufficient to state a cause of action.

establishing policy or custom, is well settled. There exists no compelling reasons for granting the petition for writ of certiorari. Respondent respectfully requests that the Court deny the petition for writ of certiorari.

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